

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

CIVIL NO. 12-257 (JB-LFG)

LARRY A. GOLDSTONE,
CLARENCE G. SIMMONS, III, and
JANE E. STARRETT,

Defendants.

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants submit *SEC v. Benger*, No. 09 C 676, 2013 U.S. Dist. LEXIS 39203 (N.D. Ill. Mar. 21, 2013), in support of its flawed argument that Plaintiff's scheme claim against Ms. Starrett is deficient.

As an initial matter, Ms. Starrett mischaracterizes the case's holding, stating that *Benger* holds "that a scheme claim must encompass *inherently deceptive conduct* beyond misrepresentations and not merely 'activities' in furtherance thereof." (Notice at 1 (emphasis in original).) The case, however, never uses the words "inherently deceptive"; "activities" is explicitly limited to "activities designed to conceal the scheme"; and the case, in fact, merely recites that "other Circuits have determined that a defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under *Rules 10b-5(a) or (c)* when the scheme also encompasses conduct beyond those misrepresentations or omissions." *Benger*, at *14 (emphasis in orginal). As we have previously explained, the Complaint here

alleges significant such conduct in furtherance of the scheme, including withholding information from Thornburg's auditors. (*See, e.g.*, Plaintiff's Surreply to Defendant Jane Starrett's Reply in Support of Motion to Dismiss (Dkt. #63) at 3-4.)

Moreover, *Benger* is readily factually distinguishable. The *Benger* court describes its purported scheme as involving "a single misrepresentation regarding commissions and concealing the identities of participants . . ." and, in contrast to cases in which scheme liability had been found proper, notes the "comparative simplicity of the scheme charged in the instant case. . . ." *Benger*, at ** 17, 20. Here, there can be no doubt that Defendants' scheme was a complicated one: among other things, it involved "purposefully" withholding information from Thornburg's auditors, filing the Form 10-K in a brief window in which margin calls were satisfied, and then quickly seeking to raise money based upon the misleading Form 10-K.

DATED this 1st day of April, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2013, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record.

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